

WAS IT FRANCE'S MARBURY v. MADISON?

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CONSTITUTIONAL COUNCIL CONDEMNS ATTACK ON LIBERTY OF ASSOCIATION RECENT ENACTMENT THEREBY ANNULLED

This heading appeared on the front page of *L'Aurore* on July 17, 1971¹ over a story which began with the word, "SENSATION!" The following October, in a law review note on the importance of the 16 July 1971 decision of the Constitutional Council, Professor Jean Rivero of the law school of the University of Paris observed that "Judicial decisions, in France—except for some by criminal court judges—rarely have the honor of appearing in *la grande presse*."² This decision was truly historic, he continued, because of the emergence of fundamental principles which, since their enunciation in the Declaration of the Rights of Man in the 1789, had been subordinated to the theory that the statutory law is the expression of the general will. The next year in an article in *Dalloz Sirey* Professor Rivero described the 16 July 1971 Council decision as the "first censure inflicted by it upon the legislator."³ He then posed the question which it will be the purpose of this article to attempt to answer: Has the Constitutional Council in the 16 July 1971 case (which considered a form of prior control on declarations of association) rendered its *Marbury v. Madison*⁴ decision in affirming the unconstitutionality of those provisions enacted by the National Assembly.⁵

In May, 1970, the French Council of Ministers decreed the dissolution of a political party named *La Gauche Prolétarienne*. The Council had proceeded pursuant to a 1936 statute which authorized such action with regard to private militias. "*Les Amis de la Cause du Peuple*," which was organized by Sartre, De Beauvoir and others who sympathized with the dissolved party, sought to perfect full legal personality but was turned down by the Prefect of Paris on the ground that the new party was in

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¹ *L'Aurore*, 17 and 18 July 1971, p. 1, 4.

² Constitutional Council, Decision of 16 July 1971, J.O. 1971 (Lois et Décrets) 7114; *Semaine Juridique*, édition Générale [hereinafter J.C.P.] 1971, II no. 16832; Rivero, *L'Actualité Juridique*, DROIT ADMINISTRATIF [hereinafter A.J.D.A.] 537, 20 October 1971.

³ Rivero, *Les principes fondamentaux reconnus par les lois de la République: une Nouvelle Catégorie Constitutionnelle?* RECUEIL DALLOZ SIREY (CHRONIQUE) 265 (1972).

⁴ 5 U.S. (1 Cranch) 137 (1803).

⁵ Rivero, note 3 *supra* at 265. Rivero cautioned against an affirmative answer to the question.

reality *La Gauche Prolétarienne* under another name. *Les Amis'* success in getting the Prefect's decision reversed by the Administrative Tribunal of Paris led the deGaulle government to push through the National Assembly a law making it possible for the Prefect in the future to withhold recognition of an association which appeared to have an immoral or illicit purpose or to be trying to reconstitute an illegal association. Senate President Poher's challenge to the constitutionality of this provision led to the Constitutional Council's decision of 16 July 1971.⁶

A similar case in the United States arose in 1969 when the president of a state college in Connecticut denied recognition to a local SDS chapter because of the national organization's history of campus violence and disruption. Claiming independence from the national SDS, the local group brought an action for declaratory and injunctive relief. Though this group was unsuccessful in the lower courts, the United States Supreme Court in June 1972 ordered that the group be given another chance to acknowledge its obligation to abide by reasonable campus regulations. Note the similarities between the French and American decisions:

French Constitutional Council

Decision of 16 July 1971⁷

... Considering that among the number of fundamental principles recognized by the laws [statutes] of the Republic and solemnly reaffirmed by the Preamble to the Constitution there must be listed the principle of *liberty of association*; that this principle is basic to the general provisions of the Law of July 1, 1901, relative to the contract of association;

that, in virtue of this principle, associations may be freely constituted and can be made public on the sole condition of the deposit of a prior declaration; that, with the exception of measures which may be taken in respect of certain categories of associations, the formation of associations, even when they appear to be void or to have an illicit purpose,

United States Supreme Court

Healy v. James, 1972⁸

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the *freedom of association* is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. [citing a line of cases going back to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)].⁹

It is to be remembered that the effect of the College's denial of recognition was a form of *prior restraint*, denying to petitioners' organization the range of associational activities [and campus facilities] described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safe-

⁶ Beardsley, *infra* note 25; for a fuller description of Poher's submission, see Beardsley at 432-36.

⁷ See note 2 *supra*.

⁸ 408 U.S. 169 (1972).

⁹ *Id.* at 181. Emphasis added.

thus cannot be subjected to *prior action* by the administrative authorities or even by the judiciary;

guarding of that interest may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action. [citing a line of cases beginning with *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931)].¹⁰

Considering that even if nothing is changed in respect of undeclared associations, the dispositions of Article 3 of the law . . . have for their purpose the institution of a procedure pursuant to which the acquisition of legal personality by declared associations may be subordinated to prior verification of their conformity to law by the judiciary;¹¹

We do not agree with the characterization by the courts below of the consequences of nonrecognition. We may concede . . . that the administration "has taken no direct action . . . to restrict the rights of petitioner's members to associate freely." But the Constitution's protection is not limited to direct interference with fundamental rights . . . the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities.¹²

Should the United States Supreme Court agree to consider the merits of a case like *Poher's*, it would have a compelling, recent precedent in *Healy v. James*.

A Frenchman with a complaint similar to William Marbury's would probably be advised to take his case to the Administrative Tribunal of the district in which the official who withheld his commission resided. His interest in obtaining his justice-of-the-peace commission is direct enough to give him the *locus standi* or *qualité* needed by a plaintiff to bring the case.¹³ The principle of public service originally formulated in the *Blanco*

¹⁰ *Id.* at 184. Emphasis added. Other cases cited were *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971), *NAACP v. Button*, 371 U.S. 415, 530 (1963) and *Louisiana ex rel. Gremlion v. NAACP*, 366 U.S. 293, 296 (1961). "We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process clause of the Fourteenth Amendment." *Gremlion* at 296, quoting from *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), another membership disclosure case. See also G. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION*, Chapter VIII (1961).

¹¹ *Id.* Emphasis added.

¹² *Id.* at 183. Emphasis added. The quotations from the opinion of the French Constitutional Council constitute virtually the entire half page opinion. The quotations from the United States Supreme Court opinion amount to about one of the twenty-four pages written by Mr. Justice Powell for eight members of the Court. Two concurring Justices added another 6 pages, and a Justice concurring only in the result wrote two more.

¹³ J. RIVERO, *DROIT ADMINISTRATIF* 216-17 (3d ed. 1965). See also A. VON MEHREN, *THE CIVIL LAW SYSTEM* 305-11 (1957). In this section on "Person Who May Invoke Review," the author states that "The individual bringing the action must always have a personal

case of 1873¹⁴ indicates that "Marbury's" case should be brought before an administrative tribunal. Although the doctrine of the separation of powers protects the *functioning* of the ordinary courts from interference by the administrative courts,¹⁵ according to the doctrine of public service the *organization* of the judiciary is considered as a branch of the public service falling within the jurisdiction of the administrative courts.¹⁶ The jurisprudence or case-law of the *Conseil d'Etat* or Council of State, which stands at the apex of the administrative law system, has extended the concept of the *acte administratif* to the extent that positive action not required and failure to act, such as Secretary of State Madison's refusal to deliver Marbury's commission, may be treated as an *acte administratif* and gives his case the ripeness necessary to satisfy the rule of the prior decisions (*la regle de la decision préalable*). A previous act and standing by the plaintiff thus satisfy the principle conditions precedent for judicial review by French administrative courts.¹⁷

If the administrative tribunal assumes as Chief Justice Marshall did, that the withholding of Marbury's commission by an official of the executive department was not a discretionary act¹⁸ warranted by law but a violation of a vested legal right, it may then consider whether the laws afford him a remedy for the violation of that right. In answering in the affirmative so far as the laws of the United States were concerned, Marshall stated:

The very essence of civil liberty certainly consists in the right of *every* individual to claim the protection of the laws whenever he receives an

interest in the action, but it can no longer be contended that this personal interest must be exclusive to him alone. It may be an interest common to all the members of a collectivity; it is sufficient that it should exist in his own person, as in the person of others, nothing more nor less is required." *Id.* at 306-07.

¹⁴ Blanco, Tribunal des conflits, 8 February 1873. III. 1720 (note), S. 1873. II 153 (note): Discussion of case by David, Commissaire du gouvernement, D. 1873. III. 20-22, S. 1873. II. 154-57. English translation in A. VON MEHREN, *THE CIVIL LAW SYSTEM* 209-14 (1957).

¹⁵ Gombert, Conseil d'Etat, 28 March 1847, S-1947 III. 89 (note): English translation in A. VON MEHREN, *THE CIVIL LAW SYSTEM* 296-99 (1957).

¹⁶ L. BROWN and J. GARDNER, *FRENCH ADMINISTRATIVE LAW* 62, 64 (1967). In *Fiacco and Vidaillac*, (Conseil d'Etat, 17 April 1953) and *Ratzel*, (Conseil d'Etat, 22 January 1954) the Conseil d'Etat took jurisdiction over cases which involved the election of judicial representatives on a council and acts affecting a civil court judges career prospects.

¹⁷ L. BROWN and J. GARDNER, *supra* note 16; see generally Chapter 6, *The Jurisdiction of the Courts*, and Chapter 7, *The Conditions Precedent for Judicial Review*.

¹⁸ In the case of *Dame de Beauvoir et Leiris c. Ministre de l'interieur*, Tribunal administratif (Paris, 25 January 1971), J.C.P. 1971 II, no. 16827, A.J.D.A. 1971, 229, it was decided according to settled case law that the issuance of a receipt for documents tendered by a political organization seeking public status was a purely ministerial act and that the Prefect had no discretion to withhold the receipt. It was this decision that led the deGaulle government to introduce the legislation which was declared unconstitutional in the Constitutional Council's decision of 16 July 1971.

injury. One of the first duties of government is to afford that protection.¹⁹

In their treatise on French Administrative law, Brown and Gardner report that, in the development of *les principes généraux du droit*, the administrative law of France

has shown its most elastic qualities and its ability to deal with any situation where in broad terms, administrative morality has not been observed.²⁰

The French judges might then ask, again as Marshall did, whether a remedy is afforded and, if so, whether it is "a mandamus issuing from this court."²¹ Their answer could be that there is in France a mandamus-like remedy—*compétence liée* (absence of discretion)²² but, unlike Marshall, they would find that it *could* issue from their court free from constitutional limitation. This would be because the Council of State and the power it shares with its inferior tribunals grew up largely outside French constitutions, and because those courts do not determine the constitutionality of statutes.²³

In answering the question of whether the Constitutional Council decision of 16 July 1971 was France's *Marbury v. Madison*, symmetry demands that the second step be consideration of how a constitutional challenge—similar to that brought by French Senate President Alain Poher—would have fared in the United States.

In France, Poher had successfully challenged the constitutionality of a law²⁴ which was passed as an urgent matter by the National Assembly over the Senate's refusal to approve it. The Senate's refusal was based on doubts as to the constitutionality of the prior restraint which the law imposed on the right to form a public nonprofit association with full legal personality. Exercising a power granted to him as President of the French Senate by Article 61 of the Constitution of 1958, Poher referred the doubtful law to the Constitutional Council on 1 July 1971. On 16 July, the Council issued a half-page decision notable in that for the first time

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Emphasis added.

²⁰ L. BROWN and J. GARDNER, *supra* note 16 at 111. Emphasis added. See Syndicat Générales Ingénieurs-Conseils, (Conseil d'Etat, 26 June 1959). Recueil Siray 1959, 202; Recueil Dalloz 1959, 541; which held that the Prime Minister was obliged to respect "the general principles of law which are binding on all rule-making authorities. See Brown, *DeGaulle's Republic and the Rule of Law: Judicial Review and the Conseil d'Etat*, 46 BOSTON U.L. REV. 479-82 (1966). See also L. BROWN and J. GARDNER at 113-14.

²¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154 (1803).

²² L. BROWN and J. GARDNER, *supra* note 16 at 122, 127.

²³ Brown, *supra* note 20 at 470.

²⁴ Project de Loi, Assemblée Nationale, Seconde Session Ordinaire de 1970-71, A.N. Doc. no. 1834, J.O. (Deb. parl. Sen.) 1971, 1430-36, 1571.

it had found that an act of the national legislature was not in conformity to the Constitution. The law was thus invalidated to the extent that it violated one of the fundamental principles recognized by the laws of the republic—in this matter, the principle of liberty of association.²⁵

The French Constitutional Council has no counterpart in the United States. A similar body, Randolph's proposed Council of Revision, was repeatedly rejected by the Framers in Philadelphia at the Constitutional Convention of 1787.²⁶ Since the decision of the United States Supreme Court in the case of *Marbury v. Madison* in 1803, however, the courts have provided a forum in which the constitutionality of legislation may be tested under the doctrine propounded by Chief Justice Marshall who spoke for the Court in that case. He based the doctrine on constitutional language providing (1) that the "judicial power shall extend to all cases in law and equity, arising under this Constitution,"²⁷ (2) that a judge swears to discharge his duties agreeably to the Constitution,²⁸ and (3) that "in declaring what shall be the supreme law of the land, the constitution itself is first mentioned," and that "not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that [supreme] rank."²⁹ Marshall concluded his opinion with this paragraph:

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts as well as other departments, are bound by that instrument.³⁰

The *Marbury* opinion which established the doctrine of constitutional review of Congressional legislation by the judiciary also set forth the basic limitations on that judicial power. Recently in *United States v. Richardson*,³¹ Chief Justice Burger summarized and cited those restrictions as still serviceable in 1974:

As far back as *Marbury v. Madison*, 1 Cranch 187 (1803), this Court held that judicial power may be exercised only in a case properly before it—a "case or controversy" not suffering any of the limitations of

²⁵ Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431, 432-36 (1972).

²⁶ See J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 60-62, 66-67, 596-97, 600-01, (Ohio University Press ed. 1966).

²⁷ 5 U.S. (1 Cranch) 137, 178 (1803).

²⁸ *Id.* at 179.

²⁹ *Id.* at 180.

³⁰ *Id.*

³¹ 94 S. Ct. 2940 (1974).

the political question doctrine, not then moot or calling for an advisory opinion.³²

Immediacy. In France, Poher's referral of the association law to the Constitutional Council had to be done before the law's promulgation.³³ In the United States, such a pre-promulgation referral would, no doubt, be met with a criticism that the challenge was premature. Even after a law's promulgation but before it has been enforced to the detriment of the complaining parties, the Supreme Court is reluctant to consider a law's constitutionality. The Court has explained this reluctance in the following words:

[D]etermination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.³⁴

The many examples of judicial restraint in such circumstances include cases which involve, as did Poher's, constraints on the exercise of the right of political association. In *United Public Workers v. Mitchell*,³⁵ for example, a union and certain classes of federal employees sought to have §9(a) of the Hatch Act³⁶ declared unconstitutional because it forbade them from taking "any active part in political management or in political campaigns." Since these employees had not yet engaged in such activities, a six-member majority of the Supreme Court found their generalized objection to be "in reality an attack on the political expediency of the Hatch Act, not the presentation of legal issues [and so] beyond the competence of courts . . ."³⁷ Again, in *Socialist Labor Party v. Gilligan*,³⁸ a political party and its officers challenged as a discriminatory preference an Ohio statutory requirement that, in order to obtain a position on the ballot, political parties which were not on the ballot in each national and gubernatorial election since 1900 must file a form of loyalty oath. Since the party had "previously secured a position on the ballot with no untoward consequences,"³⁹ the Supreme Court dismissed the party's appeal having determined six to three that the law's future effect remained

³² *Id.* at 2943.

³³ Article 61, CONSTITUTION OF FRANCE; see III A. PEASLEE, CONSTITUTIONS OF NATIONS 312, 323-24 (1968).

³⁴ *International Longshoremen's & Warehousemen's Union v. Boyd*, 347 U.S. 222, 224 (1954); citing *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) and *Muskrat v. United States*, 219 U.S. 346 (1911).

³⁵ 330 U.S. 75 (1947).

³⁶ 5 U.S.C. § 1501 et seq., § 7324 et seq. (1970).

³⁷ 330 U.S. 75, 89 (1947).

³⁸ 406 U.S. 583 (1972).

³⁹ *Id.* at 587.

wholly speculative and that the gravamen of their claim of injuries remained "quite unclear," and presented "problems of prematurity and abstractness [which might] present 'insuperable obstacles' to the Court's jurisdiction"⁴⁰

Standing. In France, the question of the constitutionality of the recently enacted statute concerning the qualification of the right of private nonprofit associations to enjoy full legal personality was referred by Poher not to a court but to a council which carries on its deliberations without the presentation of cases by rival parties.⁴¹ As President of the French Senate, Poher's "standing" to make such a submission is explicitly set forth in Article 61 of the French Constitution which provides that

[ordinary] laws may be submitted to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister or the President of either assembly.⁴²

In the United States as President or President pro tempore of the United States Senate, Poher would have no such automatic "standing." Nor would he find it easy to obtain standing as a citizen or taxpayer. Since he had not challenged a taxing or spending measure, he would not have standing as a taxpayer because there would be no "logical link between that status and the type of legislative enactment attacked."⁴³ He would thus fail to meet the threshold requirement of the double nexus test for taxpayer suits defined by the Supreme Court in *Flast v. Cohen*⁴⁴

⁴⁰ *Id.* at 587-89.

⁴¹ Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 n. 6 (1972): "The Council is usually regarded as a 'non-judicial' body because it examines the bare text of legislation submitted to it without reference to any disputed application of such legislation and because it acts *in camera*, normally without hearing verbal or written argument." Waline, *The Constitutional Council of the French Republic*, 12 AM. J. COMP. L. 483, 493 (1963): "The procedure before the Constitutional Council is entirely written and never includes the oral hearing of claimants or *avocats*, which, furthermore, would be conceivable only for electoral contests, the Council having jurisdiction in other cases (except for the referendum) only when invoked by very high authorities of the State, whom one scarcely imagines appearing to plead, or having someone plead, before it."

⁴² D. PICKLES, *THE FIFTH FRENCH REPUBLIC* 247 (1962):

In these above-mentioned cases, reference to the Constitutional Council prolongs the period allowed for promulgation.

Article 62. A provision declared unconstitutional may not be promulgated or applied.

Decisions of the Constitutional Council are not subject to appeal. They are binding on public authorities and on all administrative and judicial bodies.

Article 63. An organic law lays down the organization and methods of working of the Constitutional Council, the procedures to be followed in referring matters to it and in particular the time-limits within which disputes may be laid before it.

Id., at 247-48. The law referred by Poher was "ordinary" rather than "organic."

⁴³ *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

⁴⁴ *Id.* at 102-03: "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enact-

in 1968. As there is no evidence that Poher had a personal interest in any association having difficulty establishing legal personality, his chances with citizen standing would not be much better. In the 1974 case of *Schlesinger v. Reservists Committee to Stop the War*,⁴⁵ the Chief Justice stated on behalf of a majority of the Supreme Court:

We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest . . . held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution.⁴⁶

Gilligan, a political association case, which was cited above with reference to the immediacy problem is also pertinent to the question of standing. In dismissing the appeal of the Socialist Labor Party, the Supreme Court stated that even if the plaintiffs had met the technical requirements of standing, their case had not stated with particularity the effect on them of Ohio's affidavit requirement. Therefore the Court was obliged to follow the axiom that "federal courts do not decide abstract questions posed by parties who lack 'a personal stake in the outcome of the controversy.'"⁴⁷

The United States Supreme Court, working only from the words "case" and "controversy" in Article III of the United States Constitution, has fashioned an elaborate and overlapping set of doctrines to decide who may approach the federal courts with what kind of questions and when they may do so. In France, so far as tests of the constitutionality of legislation are concerned, questions of timing, standing and the appropriate tribunal are answered with considerable specificity (and in Poher's favor) in Title VII of the French Constitution entitled "The Constitutional Council" and in the organic legislation which that Title authorizes for the purpose of establishing the procedure to be followed by that Council. Article 61 of Title VII provides:

Article 61. Organic laws, before their promulgation, and the rules of procedure of the Parliamentary assemblies, before their application, must

ment attacked. . . . Secondly the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.'

⁴⁵ 94 S. Ct. 2925 (1974).

⁴⁶ *Id.* at 2932.

⁴⁷ *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586-87 (1972), citing *Baker v. Carr*, 369 U.S. 186, 204 (1962).

be submitted to the Constitutional Council, which pronounces on their conformity with the Constitution.

For the same purpose, [ordinary] laws may be submitted to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister or the President of either assembly.

In the cases provided for in the two preceding paragraphs, the Constitutional Council decides within a month. At the request of the Government, however, if the matter is urgent, this period may be reduced to a week.⁴⁸

In the United States, Poher's plea would have lacked three of the elements necessary to a justiciable controversy—immediacy, concreteness and directness. It is, therefore, unlikely that a United States court would have reached the merits of his case unless it chose to think of the doctrines described above as self-imposed policy guidelines rather than as constitutional limitations on the court's authority.⁴⁹ If it made the former choice, the Court might be willing to ignore such constraints—as it did, for example, in *Adler v. Board of Education*⁵⁰—and proceed to the question of whether the right of association was being endangered.

Returning to Professor Rivero's question as to whether the French Constitutional Council had, in its decision of 16 July 1971, rendered its *Marbury v. Madison* decision, it is suggested that, despite procedural and substantive differences, each decision strongly resembled the other in its activist spirit.

The *Marbury* Decision

The activism of the Court that decided the *Marbury* case was most apparent in two aspects of the decision. First, was the assurance with which the Court found the power of judicial review of congressional legislation in an instrument which was far from explicit about the assignment of such authority. Second, was the Court's failure to choose plausible—

⁴⁸ D. PICKLES, note 42 *supra*, at 247-48; A. PEASLEE, note 33 *supra* at 323-324.

⁴⁹ See *United States v. Richardson*, 94 S. Ct. 2940 (1974). See also the "rules of avoidance" listed by Mr. Justice Brandeis in a concurring opinion in *Ashwander v. Tennessee*, 297 U.S. 288, 346-48 (1936).

⁵⁰ 342 U.S. 485 (1952). Dissenting, Mr. Justice Frankfurter stated:

The allegations in the present action fall short of those found insufficient in the *Mitchell* case. These teachers do not allege that they have engaged in proscribed conduct or that they have any intention to do so. They do not suggest that they have been, or are, deterred from supporting causes or from joining organizations for fear of the [statute's] interdict, except to say generally that the system complained of will have this effect on teachers as a group. They do not assert that they are threatened with action under the law, or that steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time. . . ."

Id. at 504.

perhaps more plausible—interpretations of both Section 13 of the Judiciary Act of 1789⁵¹ and of the original and appellate jurisdiction provisions of Article III of the United States Constitution. Certain other available interpretations of the Act and the Article would have made it possible for the Court to dismiss *Marbury's* case and thus avoid the question of constitutional review.⁵²

The heart of Marshall's argument for national substantive judicial review appears in the quotations to the left below. On the right are found answers to Marshall which represent a position of judicial restraint presented a century and a half ago by Judge Gibson of the Pennsylvania Supreme Court in his dissenting opinion in the case of *Eakin v. Raub*.⁵³

Marshall, C. J.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case . . . the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty.⁵⁴

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?⁵⁵

Gibson, J.

It is the business of the judiciary, to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognisance of a collision between a law and the constitution. So, that, to affirm that the judiciary has a right to judge the existence of such collision, is to take for granted the very thing to be proved . . .⁵⁶

The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government . . . Granting it relate to the official conduct of the judge, as well as every other officer, . . . it must still be understood in reference to supporting the constitution *only as far as*

⁵¹ Act of September 24, 1789, Chapter 20, § 13; 1 Stat. 81.

⁵² See Brandeis' seventh rule of avoidance: "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Crowell v. Benson*, 285 U.S. 22, 62." Aswander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (concurring opinion).

⁵³ 12 S. & R. 330, 344-58 (Pa. 1825). For a recent comprehensive analysis of the *Marbury* opinion, see Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1. For a recent statement similar to Judge Gibson's, see Vinson, *How to Read Marbury v. Madison*, STUDENT L.J., January 1971.

⁵⁴ 5 U.S. (1 Cranch) 137, 177-78 (1803).

⁵⁵ 12 S. & R. 330, 348 (Pa. 1825). See Merke, *Marbury v. Madison*, XI N.Y.U. LAW CENTER BULLETIN 16 (1963). The author quotes the following questions by Republican Senator Breckenridge in 1803: "Is it not extraordinary that if this high power was intended it should nowhere appear? Is it not truly astonishing that the Constitution in its abundant care to define the powers of each department, should have omitted so important a power as that of the Courts to nullify all the Acts of Congress, which, in their opinion were contrary to the Constitution?" *Id.* at 19.

⁵⁶ 5 U.S. (1 Cranch) 137, 180 (1803).

that may be involved in his official duty; and consequently if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath.⁵⁷

It is not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.⁵⁸

But do not the judges do *positive* act in violation of the constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the constitution.⁵⁹

The Chief Justice's distinction between written and unwritten constitutions was no doubt an effort to forestall reference to the obvious example of parliamentary supremacy in the mother country. Judge Gibson noted in *Eakin v. Raub* that "sovereignty and legislative power are said by Sir William Blackstone to be convertible terms."⁶⁰ Compare the following assertion by Marshall concerning written constitutions with an article from a written constitution adopted the same year as the American constitution:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court, as one of the fundamental principles of our society.⁶¹

The tribunals cannot interfere in the exercise of legislative power, nor suspend the execution of the laws, nor encroach upon the administrative functions, nor cite before them the administrators on account of their functions. —Title 3, Chapter 5, Article 3 of the French Constitution of 1789.

The half-page opinion which the French Constitutional Council offered in support of its 16 July 1971 decision to invalidate a law because it interfered with liberty of association is an explanation scarcely more explicit than the answer comedienne Fanny Brice (in her role of Baby

⁵⁷ 12 S. & R. 330, 353 (Pa. 1825); Later in the opinion, Judge Gibson added, "The official oath, then, relates only to the official conduct of the officer, and does not prove that he ought to stray from the path of ordinary business, to search for violations of duty in the business of others; nor does it, as supposed, define the powers of the officer." *Id.* at 354.

⁵⁸ 5 U.S. (1 Cranch) 137, 180 (1803).

⁵⁹ 12 S. & R. 330, 353 (Pa. 1825).

⁶⁰ *Id.* at 358.

⁶¹ 5 U.S. (1 Cranch) 137, 177 (1803).

Snooks) used to give when her conduct was questioned: "I did it and I'm glad!" In the Council's opinion we see only the tip of the iceberg. Some of the more obvious of the many issues with which the Council must have had to contend in arriving at its landmark decision—but which it chose to ignore in its bland announcement—are suggested in the following exchange between "R" and "A" for Restraint and Activism.⁶²

R. The decision offends the tradition of parliamentary supremacy⁶³ which derives principally from: (1) the spirit of democracy born of the revolution;⁶⁴ (2) the reaction against the law-making propensities of the prerevolutionary judiciary (*parlements*);⁶⁵ and (3) widespread acceptance of Montesquieu's doctrine of the separation of powers.⁶⁶

A. The redistribution of power between the legislative and executive branches (Articles 34-51) marked an end to parliamentary supremacy as evidenced by Article 34's restriction of the lawmaking power of Parlia-

⁶² See Rivero, *supra* note 3 at 537-38; Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. REV. 1079, 1082-083 (1952); M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 32-36 (1971); A. VON MEHREN, *supra* note 14 at 157-64; and, generally, Beardsley, *supra* note 25.

⁶³ Haines, *Some Phases of the Theory and Practice of Judicial Review of Legislation in Foreign Countries*, 24 AM. POL. SCI. REV. 583 (1930).

In most European countries the rule prevails that the guardianship of the constitution belongs to the legislature, and, subject to a reversal by popular referendum or the election of a new assembly, the legislature determines the limits of its own authority and exercises control over the other departments of government. The legislature not only exercises ordinary legislative authority, but is recognized as possess constituent powers, or powers of an ultimate sovereign.
Id. at 591-92; Hamon, *Contrôle de constitutionnalité et protection des droits individuels*, RECUEIL DALLOZ SIREY (CHRONIQUE) 83, 88 (1974).

⁶⁴ Tunc, *Expounding and Enforcing the {constitutional} Decision*, in INTERNATIONAL SEMINAR ON CONSTITUTIONAL REVIEW 207-08 (1960); RIDLEY & BLONDEL, *PUBLIC ADMINISTRATION IN FRANCE* 128-99 (1964); Gooch, *Reflections on the Constitution of the Fifth French Republic*, 22 JOURNAL OF POLITICS 193, 195-96 (1960).

⁶⁵ King, *Constitutionalism and the Judiciary in France*, 80 POL. SCI. Q. 62, 68-70 (1965). "The constituents of the Revolutionary period apparently could not conceive of a government established on republican principles becoming oppressive. . . . In the minds of the constituents judicial activity was thus thought of as being only complementary, never opposed to legislative action." *Id.* at 69-70. BURDEAU, *COURS DE DROIT CONSTITUTIONNEL ET D'INSTITUTIONS POLITIQUE* 240-44. Burdeau gives a bibliography for those interested in the views of the leading French publicists and political figures who have opposed parliamentary omnipotence at 240. A. VON MEHREN, *supra* note 14 at 168-69. DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY* 126 (1972): "In France . . . jurists basically regard [constitutional law] dispositions as political rather than legal." M. CAPPELLETTI, MERRYMAN, and PERILLO, *THE ITALIAN LEGAL SYSTEM* 182-83 (1967): "In France the judiciary had been the object of much hatred. The protest against the judiciary took form as a protest against judicial arbitrariness, judicial lawmaking, and judicial refusal to be subject to the law. To prevent the recurrence of these abuses, it was thought that lawmaking power had to be forever taken away from the judges and lodged in a representative legislature."

⁶⁶ Haines, *supra* note 2. "The same theory of separation of powers which was thought in America to require judicial review of legislative acts to preserve written constitutions and to protect individual rights was interpreted in France to forbid the judges from interfering in the exercise of legislative powers and to prevent them from suspending the execution of laws." *Id.* at 12-13.

ment to a specified list of subjects, the institution of the Constitutional Council and other limitations on the erstwhile powers of the Assemblies.⁶⁷

R. "The sole justification for [the Constitutional Council's] existence, apart from a few purely housekeeping responsibilities, such as assuring the regularity of elections, and determining the constitutionality of treaty texts, is to define the relationship between separate instruments of government—and thus presumably by its decisions to clarify these divisions and enforce their existence."⁶⁸ (The law referred by Poher did not involve a question of separation of powers).

A. The language of Article 61 does not preclude the determination by the Constitutional Council of the constitutionality of *any* parliamentary legislation which has properly been submitted to it.⁶⁹ (as the Poher submission was.)

R. Article 34 provides that laws which determine the rules concerning "*civil rights and the fundamental guarantees of the public liberties of the citizen*" (such as liberty of association) are among the subjects

⁶⁷ Nicholas, *Loi, Reglement and Judicial Review in the Fifth Republic*, 1970 PUBLIC LAW 251. "Parliament, in short, had been both supreme and omnicompetent. But in the new Constitution the positions were reversed. It was now the sphere of Parliament that was delimited, leaving the undefined residual power in the hands of the executive." *Id.* Drago, *General Comparative View of the French Constitution*, 21 OHIO ST. L.J. 535, 547-548 (1960).

⁶⁸ GODFREY, *THE GOVERNMENT OF FRANCE* 31 (1963) (emphasis added). MACRIDIS and BERNARD BROWN, *THE DEGAULLE REPUBLIC: QUEST FOR UNITY* 173 (1960). "In contrast to the American practice, the Constitutional Council is the guardian of the constitutional provisions regarding executive-legislative relations with particular reference to lawmaking rather than the ultimate court of appeal for the protection of the law of the land at the request of an individual against legislative or administrative infringements." *Id.* M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 5-6 (1971). The Constitutional Council "has not asked if statutes violated individual rights guaranteed by the Constitution or by the Declaration of the Rights of Man. The *Conseil*, it seem, has barred the way to its own evolution as a judicial entity. Its function—to prevent legislative encroachment upon the executive jurisdiction—is and apparently will remain political." *Id.* Waline, *The Constitutional Council of the French Republic*, 12 AM. J. COMP. L. 483, 485 (1963). "And such was the principle reason for the creation of the Constitutional Council, namely, to prevent Parliament from legislating outside of the matters which were assigned (and, moreover, reserved) to it by Article 34 of the Constitution. . . . Thus, the Constitutional Council has been entrusted with different tasks which tend to make it not merely an arbitrator of conflicts of competence between Parliament and the executive, but also a kind of guarantor of the regularity of the functioning of these institutions." *Id.*

⁶⁹ See note 42 *supra*. Brown, *DeGaulle's Republic and the Rule of Law: Judicial Review and the Conseil D'Etat*, 46 BOSTON U. L. REV. 462, 468 (1966).

[I]n the early days of the [Fifth Republic the Constitutional Council] seemed likely to become one of the important organs of the state [citing WILLIAMS AND HARRISON, *DE GAULLE'S REPUBLIC* 134-135 (1960)]. This promise has not been fulfilled. The Council has not played a major role as 'guardian of the Constitution.' Instead, it has served as guardian of the executive's prerogatives against encroachment by the legislature and has also carried out its functions in a 'political' rather than a 'judicial' manner." *Id.*

in that sphere which Article 34 consigns to the competence of the legislature and are therefore beyond the scope of constitutional review.⁷⁰

A. The laws of Parliament are not beyond review but must conform to the Preamble to the Constitution which also covers fundamental rights:

The French people *solemnly proclaim their attachment* to the Rights of Man and to the principles of national sovereignty as defined by the Declaration of 1789, confirmed and completed by the Preamble of the Constitution of 1946

The following is the language from the Preamble to the Constitution of 1946 which was incorporated by reference into the Constitution of 1958:

The French people proclaim once more that every human being, without distinction of race, religion, or belief, possesses inalienable and sacred rights. It solemnly reaffirms the rights and freedoms of man and of the citizen consecrated by the Declaration of the Rights of 1789 and the *fundamental principles recognized by the laws* of the Republic.⁷¹

R. The precatory nature of the words "solemnly proclaim their attachment" and evidence of the attitude of the draftsmen of the 1958 Constitution support the conclusion that Parliament is not bound by the Preamble.⁷²

A. Parliament is bound by the Preamble because, unlike the 1946 Preamble, it appears after words of adoption and because the 1958 Constitution has no counterpart of Article 92 of the Constitution of 1946 which distinguished between its Preamble and its first ten Titles to which it assigns normative value.⁷³

⁷⁰ Emphasis added. Rivero, *supra* note 4 at 267. Beardsley *supra* note 25 at 439-42 (citing BURDEAU, *LES LIBERTES PUBLIQUES* 63-73 (1966)).

⁷¹ Emphasis added. See Engle, *Judicial Review and Political Preview of Legislation in Post-War France*, 6 INTER-AMERICAN L. REV. 53, 64 (1964). "[T]his system of preview of legislation of the Fifth Republic resembles our [American] system and differs from that of the Fourth Republic in (1) that it covers civil rights and other legislation mentioned in the Preamble to the constitution, and . . ." *Id.*

⁷² Malezieux, *The Fifth Republic*, 8 AM. J. COMP. L. 218, 227 (1959). "*The Provisions of the Constitution Do Not All Have the Same Juridical Value*. Distinctions must be drawn between several parts of the text of the Constitution. As in our prior constitutions, the Preamble must be considered as having a political value, excluding any fixed juridical import." *Id.* Beardsley, *supra* note 25 at 442-45. During an interview soon after the adoption of the 1958 Constitution, Raymond Aron stated that he did not think the 1946 Preamble should be taken too seriously.

Question: It is a part of the new Constitution. The 1958 Preamble says, "confirmed by the Preamble of 1946."

ARON: I can tell you why this was done. In the first draft there was no reference to the 1946 Preamble, and the opposition said, "You see what a reactionary government we have. They have destroyed all reference to social rights, to the social duty of the state, and so on." In order to disarm the leftist opposition, the Preamble was redrafted with reference to the 1956 Preamble. That is all.

ARON, FRANCE—THE NEW REPUBLIC 48 (1960).

⁷³ Von Mehren, *supra* note 14 at 156-57. Beardsley, *supra* note 25 at 444.

R. But the Preamble contains no reference to liberty of association either expressly or through the incorporation by reference of the rights defined by the Declaration of 1789.

A. The Constitutional Council has interpreted the 1958 Preamble as having incorporated by reference "fundamental principles recognized by the laws of the [Third⁷⁴] Republic."

R. The Council cites no law which defines liberty of association as "fundamental" and the law of private association of 1 July 1901—an amendment to which the Council invalidated in its decision of 16 July 1971—contains no such definition.⁷⁵

A. As a part of the 1958 scheme for the allocation of power between a "lawmaking" Parliament and a "rule-making" Executive, a new Constitutional Council and the venerable *Conseil d'Etat* were, respectively, given watch-dog roles with regard to the two branches.⁷⁶ It is logical that the Council should follow the lead of the *Conseil* by developing a body of case law giving concrete expression to the term "fundamental principles recognized by the laws of the Republic" just as the latter body has established the constitutional or quasi-constitutional value of "general principles of law" and has done so without necessarily relying upon specific legislative language.⁷⁷

The voice of Restraint might conclude by quoting from the dissenting opinion of Mr. Justice Black in the case of *Adamson v. California*:⁷⁸

This decision reasserts a constitutional theory spelled out in *Twining v. New Jersey*, 211 U.S. 78 [1908], that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental principles of liberty and justice." . . . [T]his formula . . . has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain . . ."⁷⁹

⁷⁴ Rivero, *supra* note 3 at 267.

⁷⁵ Beardsley, *supra* note 25 at 450.

⁷⁶ See Articles 61 and 37 and 38 of the 1958 Constitution.

⁷⁷ Brown, *supra* note 69 at 479; Beardsley, *supra* note 15 at 444-48; Burin, *Executive Power and the Rule of Law in the Fifth French Republic*, 33 SOCIAL RESEARCH 207, 413, 416 (1966); Chapus, *De la valeur juridique des principes generaux du droit et des autres regles jurisprudentielles due droit administratif*, RECUEIL DALLOZ SIREY (CHRONIQUE) 99, 99-100 (1966).

⁷⁸ 332 U.S. 46 (1947).

⁷⁹ *Id.* at 69, 90. "And I further contend that 'the natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that

The first difference between the action brought by Marbury and that brought by Poher is that Marbury lost his case, whereas Poher won vindication of the constitutional judgment of the Assembly of which he was President. Second, the United States Supreme Court's opinion dealt with the distribution of power between the judicial and executive branches—a question at the very threshold of constitutional review, but the decision of the Constitutional Council went much further and established an unenumerated fundamental right—that of liberty of association. Third, the Marshall opinion is profuse, convoluted and rhetorical but the French opinion is terse, spare and even skimpy. Finally, one proceeding was contentious and adversary in every sense of the term, whereas the other reviewed a law before its promulgation and had neither parties nor a statement of rival cases. To one commentator, the two proceedings represent a contrast between judicial review and political preview.⁸⁰

Nevertheless, the decision of 16 July 1971 is the spiritual descendant of the decision in *Marbury v. Madison*. In each instance, the decision-making body exercised power far more extensive than many had thought to be constitutionally authorized. Mindful of Professor Rivero's warning against concluding that this single swallow imports a springtime of constitutional control,⁸¹ it may be concluded that the French Constitutional Council has, in that decision, laid the groundwork for future substantive constitutional review of legislative action of the kind that has been the hallmark of the work of the United States Supreme Court during much of the last quarter century.

is subtly conveys to courts at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power . . ." *Id.* at 75. Of the many opinions Mr. Justice Black wrote during his thirty-four years on the Supreme Court, this was his favorite.

⁸⁰ Engel, *Judicial Review and Political Preview of Legislation in Post-War France*, 6 INTER-AMERICAN L. R. 53 (1964).

⁸¹ Rivero, *supra* note 3 at 265.